

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 12, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORA C.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:20-cv-00428-MKD

ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

ECF Nos. 19, 20

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 19, 20. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion, ECF No. 19, and denies Defendant's motion, ECF No. 20.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §§
2 404.1502(a), 416.902(a). Further, a district court “may not reverse an ALJ’s
3 decision on account of an error that is harmless.” *Id.* An error is harmless “where
4 it is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at
5 1115 (quotation and citation omitted). The party appealing the ALJ’s decision
6 generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*,
7 556 U.S. 396, 409-10 (2009).

8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within
10 the meaning of the Social Security Act. First, the claimant must be “unable to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment which can be expected to result in death or which
13 has lasted or can be expected to last for a continuous period of not less than twelve
14 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
15 impairment must be “of such severity that he is not only unable to do his previous
16 work[,] but cannot, considering his age, education, and work experience, engage in
17 any other kind of substantial gainful work which exists in the national economy.”
18 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential analysis to
20 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§

1 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
2 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
3 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
4 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
5 404.1520(b), 416.920(b).

6 If the claimant is not engaged in substantial gainful activity, the analysis
7 proceeds to step two. At this step, the Commissioner considers the severity of the
8 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
9 claimant suffers from "any impairment or combination of impairments which
10 significantly limits [his or her] physical or mental ability to do basic work
11 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
12 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
13 however, the Commissioner must find that the claimant is not disabled. *Id.*

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, the analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. *Id.*

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
8 capable of performing other work; and 2) such work “exists in significant numbers
9 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
10 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 On February 23, 2017, Plaintiff applied for Title II disability insurance
13 benefits. Tr. 17, 90, 251-57. On September 30, 2017, Plaintiff applied for Title
14 XVI supplemental security income benefits. Tr. 17, 91, 258-66. The applications
15 were denied initially and on reconsideration. Tr. 150-53, 155-60. Plaintiff
16 appeared before an administrative law judge (ALJ) on December 5, 2019. Tr. 34-
17 64. On January 22, 2020, the ALJ denied Plaintiff’s claim. Tr. 14-33.

18 At step one of the sequential evaluation process, the ALJ found Plaintiff,
19 who met the insured status requirements through December 31, 2018, has not
20 engaged in substantial gainful activity since May 15, 2015. Tr. 19. At step two,

1 the ALJ found that Plaintiff has the following severe impairments: lumbar
2 degenerative disc disease, status post three surgeries; obesity; and hypothyroidism.
3 *Id.*

4 At step three, the ALJ found Plaintiff does not have an impairment or
5 combination of impairments that meets or medically equals the severity of a listed
6 impairment. Tr. 20. The ALJ then concluded that Plaintiff has the RFC to perform
7 sedentary work with the following limitations:

8 [S]he can lift and carry ten pounds occasionally and can stand and
9 walk two hours out of an eight[-]hour workday and can sit for up to
10 eight hours with normal breaks. She must be allowed the option to
11 change from a standing position to a sitting position, or vice-versa
12 every thirty minutes or so for a period of five minutes or so, while
13 remaining at the workstation. She should not push and pull and
14 should not operate foot controls with the left leg. She cannot climb
15 ladders, ropes, and scaffolds, and can occasionally climb ramps and
16 stairs. [Plaintiff] needs to use a walker for prolonged ambulation or
17 standing. She can occasionally stoop, and never crouch, kneel and
18 crawl. [Plaintiff] should not have any exposure to moving or
19 dangerous machinery or unprotected heights. Due to the use of
20 medication, she can work in jobs where concentration is not critical,
- with “critical” defined as careful, exact evaluation and judgment.

Tr. 20-21.

16 At step four, the ALJ found Plaintiff is unable to perform any of her past
17 relevant work. Tr. 24. At step five, the ALJ found that, considering Plaintiff’s
18 age, education, work experience, RFC, and testimony from the vocational expert,
19 there were jobs that existed in significant numbers in the national economy that
20 Plaintiff could perform, such as document preparer, hand packager/addresser, and

1 stuffer. Tr. 25. Therefore, the ALJ concluded Plaintiff was not under a disability,
2 as defined in the Social Security Act, from the alleged onset date of May 15, 2015,
3 through the date of the decision. *Id.*

4 On September 17, 2020, the Appeals Council denied review of the ALJ's
5 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
6 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

7 ISSUES

8 Plaintiff seeks judicial review of the Commissioner's final decision denying
9 her disability insurance benefits under Title II and supplemental security income
10 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
11 issues for review:

- 12 1. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 13 2. Whether the ALJ properly evaluated the medical opinion evidence; and
- 14 3. Whether the ALJ conducted a proper step-five analysis.

15 ECF No. 19 at 6.

16 DISCUSSION

17 A. Plaintiff's Symptom Claims

18 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
19 convincing in discrediting her symptom claims. ECF No. 19 at 16-20. An ALJ
20 engages in a two-step analysis to determine whether to discount a claimant's

1 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
2 “First, the ALJ must determine whether there is objective medical evidence of an
3 underlying impairment which could reasonably be expected to produce the pain or
4 other symptoms alleged.” *Molina*, 674 F.3d at 1112 (quotation marks omitted).
5 “The claimant is not required to show that [the claimant’s] impairment could
6 reasonably be expected to cause the severity of the symptom [the claimant] has
7 alleged; [the claimant] need only show that it could reasonably have caused some
8 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

9 Second, “[i]f the claimant meets the first test and there is no evidence of
10 malingering, the ALJ can only reject the claimant’s testimony about the severity of
11 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
12 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
13 omitted). General findings are insufficient; rather, the ALJ must identify what
14 symptom claims are being discounted and what evidence undermines these claims.
15 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
16 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
17 explain why it discounted claimant’s symptom claims)). “The clear and
18 convincing [evidence] standard is the most demanding required in Social Security
19 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
20 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

1 Factors to be considered in evaluating the intensity, persistence, and limiting
2 effects of a claimant's symptoms include: 1) daily activities; 2) the location,
3 duration, frequency, and intensity of pain or other symptoms; 3) factors that
4 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
5 side effects of any medication an individual takes or has taken to alleviate pain or
6 other symptoms; 5) treatment, other than medication, an individual receives or has
7 received for relief of pain or other symptoms; 6) any measures other than treatment
8 an individual uses or has used to relieve pain or other symptoms; and 7) any other
9 factors concerning an individual's functional limitations and restrictions due to
10 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §§
11 404.1529(c), 416.929(c). The ALJ is instructed to "consider all of the evidence in
12 an individual's record," to "determine how symptoms limit ability to perform
13 work-related activities." SSR 16-3p, 2016 WL 1119029, at *2.

14 The ALJ found that Plaintiff's medically determinable impairments could
15 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
16 statements concerning the intensity, persistence, and limiting effects of her
17 symptoms were not entirely consistent with the evidence. Tr. 22.

18 *1. Improvement with Treatment*

19 The ALJ found Plaintiff's symptom claims were inconsistent with Plaintiff's
20 improvement with treatment. Tr. 23. The effectiveness of treatment is a relevant

1 factor in determining the severity of a claimant's symptoms. 20 C.F.R. §§
2 404.1529(c)(3), 416.929(c)(3) (2011); *Warre v. Comm'r of Soc. Sec. Admin.*, 439
3 F.3d 1001, 1006 (9th Cir. 2006) (determining that conditions effectively controlled
4 with medication are not disabling for purposes of determining eligibility for
5 benefits); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (recognizing
6 that a favorable response to treatment can undermine a claimant's complaints of
7 debilitating pain or other severe limitations).

8 The ALJ found Plaintiff's symptoms improved with treatment. Tr. 21-22.
9 The ALJ noted that Plaintiff had a surgery in August 2014, however she developed
10 further issues and required another surgery in May 2015, but she did not have
11 improvement after the 2015 surgery. Tr. 21 (citing Tr. 416, 420). In February
12 2016, Plaintiff had another surgery, and has continued to treat her pain with
13 medication. Tr. 21-22 (citing Tr. 459, 783). In January 2018, Plaintiff was taking
14 gabapentin, cyclobenzaprine, and meloxicam daily, and tramadol two to three
15 times per day for worsening of back pain. Tr. 783. The ALJ noted that Plaintiff
16 has only been seen for pain exacerbations once per year since the third surgery. Tr.
17 22 (citing Tr. 818, 1629, 2016). The ALJ also noted Plaintiff continued to use a
18 walker and cane at multiple appointments. Tr. 22. Plaintiff continued to have
19 decreased range of motion and sensation in her left lower extremity, and
20 tenderness, has had an abnormal gait, and positive straight leg raise test. *Id.* (citing

1 Tr. 419, 543, 547, 758-59, 819). However, the ALJ noted Plaintiff had a normal
2 gait, strength, and range of motion at multiple appointments, with no tenderness or
3 pain, and negative straight leg raise tests. Tr. 23 (citing, e.g., Tr. 419, 458, 543-44,
4 548). The ALJ found that Plaintiff reported her pain was well-controlled with
5 medication, Tr. 22-23 (citing Tr. 458, 1813).

6 While the ALJ cites to appointments where Plaintiff had some normal
7 physical examination findings and reported her pain was well-controlled with
8 medication, the ALJ's overall assessment finding Plaintiff had continuous
9 improvement with treatment is not supported by substantial evidence. At the
10 January 2016 visit, Plaintiff was seen for a pre-operative visit; while Plaintiff had
11 no tenderness, and normal range of motion and reflexes, she had a "significant
12 forward bend and sagittal imbalance," and imaging documented "clearly unstable
13 pseudoarthrosis," with "loose instrumentation," and her fusion surgery was labeled
14 as a failed surgery, requiring a second surgery. Tr. 416-20. At the May 2019 visit,
15 Plaintiff reported she can walk "short distances with a cane," and her pain is "more
16 or less controlled with tramadol" but "[l]ately she took extra dose of tramadol for
17 worsening of back pain." Tr. 1813. The ALJ also cites to a February 2016 visit
18 when Plaintiff reported her pain was controlled with medication, however the visit
19 was for post-surgical physical therapy, and Plaintiff was using a four-wheeled
20

1 walker for functional activities. Tr. 458. In October 2019, Plaintiff requested
2 Medrol for another back pain flare up. Tr. 2015.

3 The ALJ also repeatedly noted Plaintiff's need for a cane. Tr. 21-23. The
4 RFC includes the Plaintiff's need to "use a walker for prolonged ambulation or
5 standing." Tr. 20-21. However, the ALJ failed to include the use of a cane in the
6 RFC, thus rejecting Plaintiff's allegation that she needs a cane without any
7 explanation. *Id.* The ALJ noted that even with improvement after surgery,
8 Plaintiff continued to use a cane. Tr. 21-23. The ALJ also acknowledged the State
9 agency consultants opined Plaintiff needs a cane for all ambulation. Tr. 23, 73, 85.
10 The ALJ also gave no reason to reject the State agency opinions that Plaintiff
11 requires a cane for all ambulation. Tr. 23.

12 The ALJ's finding that Plaintiff's allegations are inconsistent with her
13 improvement with treatment is not supported by substantial evidence.

14 2. *Activities of Daily Living*

15 The ALJ found Plaintiff's symptom claims were inconsistent with her
16 activities of daily living. Tr. 23. The ALJ may consider a claimant's activities that
17 undermine reported symptoms. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
18 2001). If a claimant can spend a substantial part of the day engaged in pursuits
19 involving the performance of exertional or non-exertional functions, the ALJ may
20 find these activities inconsistent with the reported disabling symptoms. *Fair v.*

1 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Molina*, 674 F.3d at 1113. “While a
2 claimant need not vegetate in a dark room in order to be eligible for benefits, the
3 ALJ may discount a claimant’s symptom claims when the claimant reports
4 participation in everyday activities indicating capacities that are transferable to a
5 work setting” or when activities “contradict claims of a totally debilitating
6 impairment.” *Molina*, 674 F.3d at 1112-13.

7 Plaintiff reported being independent in her activities of daily living,
8 including being able to walk her dog, drive, complete housework, and sit through
9 long flights. Tr. 23 (citing Tr. 546, 1813, 1904, 1972). In July 2016, five and a
10 half months after surgery, Plaintiff reported walking her dog with a cane, and using
11 a brace when she does housework or drives. Tr. 546. In May 2019, Plaintiff
12 reported walking short distances with a cane, and reported being ambulatory with
13 the help of pain medication; the medical record does not contain any further
14 discussion of activities of daily living. Tr. 1813. In July 2019, Plaintiff reported
15 she remained active and independent in her activities of daily living, but there is no
16 discussion of what the activities are or how she performs them. Tr. 1904. In
17 August 2019, Plaintiff reported flying to Nevada, but there is no discussion about
18 her trip, such as the length of the flight. Tr. 1972.

19 Plaintiff has reported an inability to stand, walk, and sit for prolonged
20 periods of time, a need to lay down to rest between activities, and having waxing

1 and waning symptoms that cause “good days” and bad days. Tr. 320-21. While
2 the ALJ cited to Plaintiff’s reports that she is independent in her daily activities,
3 Plaintiff has reported preparing frozen meals and drinking Ensure as her form of
4 preparing meals, receiving help with household chores, shopping for small
5 groceries and the adult diapers that she must wear due to nerve issues, being able
6 to walk for a “few minutes” before needing to rest, and using a cane daily and a
7 rolling walker as needed. Tr. 321-25. The ALJ’s limited discussion of Plaintiff’s
8 activities and minimal citations do not set forth an analysis as to how Plaintiff’s
9 activities are inconsistent with her allegations. For example, a single occasion of
10 flying, without any further information about the duration of the flight nor
11 Plaintiff’s need to move, or recline during the flight, does not demonstrate an
12 inconsistency with Plaintiff’s inability to sustain an eight-hour workday that
13 requires she sit, stand, and/or walk for longer than short distances or 20 minutes at
14 a time. The ALJ’s finding that Plaintiff’s symptom claims are inconsistent with
15 her activities of daily living is not supported by substantial evidence.

16 *3. Inconsistent Objective Medical Evidence*

17 The ALJ found Plaintiff’s symptom claims were inconsistent with the
18 objective medical evidence. Tr. 21-23. An ALJ may not discredit a claimant’s
19 symptom testimony and deny benefits solely because the degree of the symptoms
20 alleged is not supported by objective medical evidence. *Rollins*, 261 F.3d at 857;

1 *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at 601;
2 *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 1995). However, the objective
3 medical evidence is a relevant factor, along with the medical source's information
4 about the claimant's pain or other symptoms, in determining the severity of a
5 claimant's symptoms and their disabling effects. *Rollins*, 261 F.3d at 857; 20
6 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2).

7 As the other two reasons the ALJ gave to reject Plaintiff's symptom claims
8 are not supported by substantial evidence, the ALJ erred in rejecting Plaintiff's
9 symptom claims as inconsistent with the objective medical evidence. On remand,
10 the ALJ is instructed to reconsider Plaintiff's symptom claims, and incorporate
11 Plaintiff's claims into the RFC, or give clear and convincing reasons, supported by
12 substantial evidence, to reject her claims.

13 **B. Medical Opinion Evidence**

14 Plaintiff contends the ALJ erred in his consideration of the opinions of John
15 Forest, M.D.; Sanjit Dutta, M.D.; and Pamela Corson, M.D. ECF No. 19 at 8-16.

16 There are three types of physicians: "(1) those who treat the claimant
17 (treating physicians); (2) those who examine but do not treat the claimant
18 (examining physicians); and (3) those who neither examine nor treat the claimant
19 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."
20 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).

1 Generally, a treating physician's opinion carries more weight than an examining
2 physician's, and an examining physician's opinion carries more weight than a
3 reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight
4 to opinions that are explained than to those that are not, and to the opinions of
5 specialists concerning matters relating to their specialty over that of
6 nonspecialists." *Id.* (citations omitted).

7 If a treating or examining physician's opinion is uncontradicted, the ALJ
8 may reject it only by offering "clear and convincing reasons that are supported by
9 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

10 "However, the ALJ need not accept the opinion of any physician, including a
11 treating physician, if that opinion is brief, conclusory and inadequately supported
12 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
13 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or
14 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ
15 may only reject it by providing specific and legitimate reasons that are supported
16 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
17 31). The opinion of a nonexamining physician may serve as substantial evidence if
18 it is supported by other independent evidence in the record. *Andrews v. Shalala*,
19 53 F.3d 1035, 1041 (9th Cir. 1995).

1 As the case is being remanded for the ALJ to reconsider Plaintiff's symptom
2 claims, the ALJ is also instructed to reconsider the medical opinion evidence. The
3 ALJ is instructed to consider whether the statements of Dr. Dutta, Tr. 1733, and
4 Dr. Forest, Tr. 812, amount to opinions. If the ALJ finds the statements are
5 opinions, the ALJ is instructed to incorporate the limitations into the RFC or give
6 specific and legitimate reasons, supported by substantial evidence, to reject the
7 opinions. As discussed *supra*, the ALJ also did not incorporate the State agency
8 opinions that Plaintiff requires the use of a cane for all ambulation into the RFC.
9 The ALJ is also instructed to incorporate the opinions into the RFC or give reasons
10 supported by substantial evidence to reject the opinions.

11 C. Step Five

12 Plaintiff contends the ALJ erred at step five by relying on vocational expert
13 testimony given in response to an incomplete hypothetical. ECF No. 19 at 20. "If
14 an ALJ's hypothetical does not reflect all of the claimant's limitations, then the
15 expert's testimony has no evidentiary value to support a finding that the claimant
16 can perform jobs in the national economy." *Id.* However, the ALJ "is free to
17 accept or reject restrictions in a hypothetical question that are not supported by
18 substantial evidence." *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006).

1 As the case is being remanded for the ALJ to reconsider Plaintiff's symptom
2 claims and the medical opinion evidence, the ALJ is also instructed to perform the
3 five-step analysis anew, including making a new step-five determination.

4 **D. Remedy**

5 Plaintiff urges this Court to remand for an immediate award of benefits.
6 ECF No. 19 at 10, 20.

7 "The decision whether to remand a case for additional evidence, or simply to
8 award benefits is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d
9 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
10 When the Court reverses an ALJ's decision for error, the Court "ordinarily must
11 remand to the agency for further proceedings." *Leon v. Berryhill*, 880 F.3d 1041,
12 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) ("the
13 proper course, except in rare circumstances, is to remand to the agency for
14 additional investigation or explanation"); *Treichler v. Comm'r of Soc. Sec. Admin.*,
15 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security
16 cases, the Ninth Circuit has "stated or implied that it would be an abuse of
17 discretion for a district court not to remand for an award of benefits" when three
18 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the
19 credit-as-true rule, where (1) the record has been fully developed and further
20 administrative proceedings would serve no useful purpose; (2) the ALJ has failed

1 to provide legally sufficient reasons for rejecting evidence, whether claimant
2 testimony or medical opinion; and (3) if the improperly discredited evidence were
3 credited as true, the ALJ would be required to find the claimant disabled on
4 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
5 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
6 the Court will not remand for immediate payment of benefits if “the record as a
7 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
8 F.3d at 1021.

9 The Court finds further proceedings are necessary. While Plaintiff argues
10 Dr. Forest and Dr. Dutta’s opinions should be credited as true, the provider’s
11 statements are not clearly opinions; the ALJ must first determine if the statements
12 are opinions and address the statements accordingly. While Plaintiff also argues
13 Dr. Corson’s opinion and Plaintiff’s symptom claims should be credited as true,
14 the Court finds there are conflicts in the record requiring resolution. The ALJ
15 identified multiple records in which Plaintiff had a normal gait, and multiple other
16 normal objective findings that were inconsistent with Dr. Corson’s opinion and
17 Plaintiff’s claims. There are references to Plaintiff being able to “walk around
18 without any difficulties,” Tr. 1629, and having a normal gait, without mention of
19 an assistive device, Tr. 1632, 1648, 1908. Thus, the case is remanded for further
20 proceedings consistent with this Order.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court concludes the
3 ALJ's decision is not supported by substantial evidence and is not free of harmful
4 legal error. Accordingly, **IT IS HEREBY ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is **GRANTED**.

6 2. Defendant's Motion for Summary Judgment, **ECF No. 20**, is **DENIED**.

7 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
8 **REVERSING** and **REMANDING** the matter to the Commissioner of Social
9 Security for further proceedings consistent with this recommendation pursuant to
10 sentence four of 42 U.S.C. § 405(g).

11 The District Court Executive is directed to file this Order, provide copies to
12 counsel, and **CLOSE THE FILE**.

13 DATED August 12, 2022.

14 s/Mary K. Dimke
15 MARY K. DIMKE
16 UNITED STATES DISTRICT JUDGE
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